Jacobson v Massachusetts: It's Not Your Great-Great-Grandfather's Public Health Law

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Jacobson v Massachusetts, a 1905 US Supreme Court decision, raised questions about the power of state government to protect the public's health and the Constitution's protection of personal liberty. We examined conceptions about state power and personal liberty in *Jacobson* and later cases that expanded, superseded, or even ignored those ideas.

Public health and constitutional law have evolved to better protect both health and human rights. States' sovereign power to make laws of all kinds has not changed in the past century. What has changed is the Court's recognition of the importance of individual liberty and how it limits that power. Preserving the public's health in the 21st century requires preserving respect for personal liberty. (*Am J Public Health*. 2005;95:581–590. doi:10.2105/AJPH.2004.055160)

"*The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.*"

—*Missouri v Holland*[1]

ONE HUNDRED YEARS AGO, in *Jacobson v Massachusetts*, the US Supreme Court upheld the Cambridge, Mass, Board of Health's authority to require vaccination against smallpox during a smallpox epidemic.[2] *Jacobson* was one of the few Supreme Court cases before 1960 in which a citizen challenged the state's authority to impose mandatory restrictions on personal liberty for public health purposes. What might such a case teach us today? First, it raises timeless questions about the power of state government to take specific action to protect the public's health and the Constitution's protection of personal liberty. What limits state power? What does constitutionally pro-

tected liberty include? Second, answers to these questions can change as scientific knowledge, social institutions, and constitutional jurisprudence progress. A comparison of answers to these questions 100 years ago and today shows how public health and constitutional law have evolved to better protect both health and human rights.

Jacobson was decided in 1905, when infectious diseases were the leading cause of death and public health programs were organized primarily at the state and community levels. The federal government had comparatively little involvement in health matters, other than preventing ships from bringing diseases such as yellow fever into the nation's ports.[3] Few weapons existed to combat epidemics. There was no Food and Drug Administration (FDA), no regulation of research, and no doctrine of informed consent. The Flexner Report was 5 years in the future, medicine would have little to offer until sulfonamides were developed in the 1930s, and most vaccines would not be available for almost half a century.[4,5] Hospitals were only beginning to take their modern form,[6] and people who had mental illnesses were often shut away in asylums.[7,8] Contraception and interracial marriage were crimes,[9] women did not have the right to vote, and Jim Crow laws prevented African American men from exercising constitutional rights that it took the Civil War to win.[10]

Today, smallpox has been eradicated. The major causes of death are chronic diseases and trauma, which are influenced by multiple factors, including environment, occupation, socioeconomic status, race/ethnicity, diet, behavior, and political inequality.[11,12] Immunizations prevent many infectious diseases, and new outbreaks are most likely to result from global travel, laboratory accidents, or even criminal acts.[13] Scientific advances have produced an array of health care facilities, drugs, vaccines, and technologies to prevent and treat health problems. Much of the responsibility for regulating the safety of the workplace, air, water, food, and drugs has shifted to the federal government.[14] Women have the right to vote and to decide whether to have children. Patients have the right to refuse medical treatment,[15] and everyone has the right to be free from arbitrary or discriminatory detention.[16]

The states' sovereign power to make laws of all kinds has not changed during the past century. What has changed is the US Supreme Court's recognition of the importance of individual liberty and how it limits that power. Additionally, states have changed how they use their power and what they regulate as new health problems and solutions emerge. In this article, we discuss these changes by examining (1) the conceptions of state power and personal liberty discussed in *Jacobson* and (2) 20th-century cases that expanded, superseded, or even ignored those concepts. Finally, we speculate about how challenges to analogous public health laws would be decided today in light of the evolution of science and constitutional law.

JACOBSON V MASSACHUSETTS

As the 20th century began, epidemics of infectious diseases such as smallpox remained a recurrent threat. A Massachusetts statute granted city boards of health the authority to require vaccination "when necessary for public health or safety."[17] In 1902, when smallpox surged in Cambridge, the city's board of health issued an order pursuant to this authority that required all adults to be vaccinated to halt the disease. The statutory penalty for refusing vaccination was a monetary fine of $5 (about $100 today). There was no provision for actually forcing vaccination on any person.

Henning Jacobson refused vaccination, claiming that he and his son had had bad reactions to earlier vaccinations. The Massachusetts Supreme Judicial Court found it unnecessary to worry about any possible harm from vaccination, because no one could actually be forced to be vaccinated: "If a person should deem it important that vaccination should not be performed in his case, and the authorities should think otherwise, it is not in their power to vaccinate him by force, and the worst that could happen to him under the statute would be the payment of $5."[18] Jacobson was fined, and he appealed to the US Supreme Court.

The Supreme Court had no difficulty upholding the state's power to grant the board of health authority to order a general vaccination program during an epidemic. No one disputed, and the Constitution confirmed, that states retained all the sovereign authority they had not ceded to the national government in the Constitution.[19–23] There had never been any doubt that, subject to constitutional limitations, states had authority to legislate with respect to all matters within their geographic boundaries, or to police their internal affairs, which Chief Justice Marshall referred to as the "police power."[24–26] During the 1800s, the Supreme Court confirmed that this power included the power to pass laws that promote the "health, peace, morals, education and good order of the people."[27–29] Most early Supreme Court cases that involved state police powers, however, were disputes over which level of government—state or federal—had jurisdiction to regulate or tax a commercial activity.[30–37] *Jacobson* was the rare case in which a state's jurisdiction was not questioned—because no one claimed that the federal government should control a local smallpox epidemic. Instead, the question was whether the state had overstepped its own authority and whether the sphere of personal liberty protected by the Due Process Clause of the 14th Amendment[38] included the right to refuse vaccination.

Justice Harlan stated the question before the Court: "Is this statute . . . inconsistent with the liberty which the Constitution of

the United States secures to every person against deprivation by the State?"[2(p25)] Harlan confirmed that the Constitution protects individual liberty and that liberty is not "an absolute right in each person to be, in all times and in all circumstances, wholly free from restraint":

> There is, of course, a sphere within which the individual may assert the supremacy of his own will and rightfully dispute the authority of any human government, especially of any free government existing under a written constitution. But it is equally true that in every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand.[2(p29)]

Thus, the more specific questions were whether the safety of the public justified this particular restriction and whether it was enforceable by reasonable regulations. The Court answered *yes* to both questions. It noted that the vaccination law applied "only when, in the opinion of the Board of Health, that was necessary for the public health or the public safety."[2(p27)] The board of health was qualified to make that judgment, and, consistent with its own precedents, the Court said that it was the legislature's prerogative to determine *how* to control the epidemic, as long as it did not act in an unreasonable, arbitrary or oppressive manner.[2,39,40] Vaccination was a reasonable means of control: "The state legislature proceeded upon the theory which recognized vaccination as at least an effective if not the best known way in which to meet and suppress the evils of a smallpox epidemic that imperiled an entire population."[2(p31)]

The Court nonetheless concluded with a note of caution:

> The police power of a State, whether exercised by the legislature, or by a local body acting under its authority, may be exerted in such circumstances or by regulations so arbitrary and oppressive in particular cases as to justify the interference of the courts to prevent wrong and oppression.[2(p38)]

For example, it noted that the law should not be understood to apply to anyone who could show that vaccination would impair his health or probably cause his death.

In most respects, *Jacobson* was an easy case.[41] The decision held that a state may require healthy adults to accept an effective vaccination when an existing epidemic endangers a community's population. As with all court decisions, what this "means" is a matter of interpretation. *Jacobson* may be what Sunstein called a narrow and shallow decision—narrow because it is not intended to apply to a broad range of legislation, and shallow because it does not explicitly rely on a general theory of constitutional interpretation to justify its result.[42] People who have quite different world views or philosophies can accept the decision because it need not require the same result for different laws or in different circumstances. Not surprisingly, judges and scholars emphasize different language in the opinion to support different interpretations.[43–46]

JACOBSON'S INFLUENCE DURING THE FIRST HALF OF THE 20TH CENTURY

The Court described police power as essentially unlimited except by provisions of the Constitution and the state's own constitution. The federal Constitution created federal powers; it did not create state powers. The Court did not attempt to specify what the police power covers, because it is essentially the power of a sovereign state to make and enforce laws.[21] Thus, the real question was, and continues to be, what limits sovereign state power?

The Court confirmed that the 14th Amendment protected individual liberty, which limits state power. It did not attempt to specify everything included in the definition of liberty, because liberty is a broad concept. Beyond freedom from physical restraint or bodily invasion, it includes freedom of thought, belief, expression, and decisionmaking. The constitutional question was whether the state could justify restricting 1 aspect of liberty (the liberty to refuse vaccination). Without justification, the law is unconstitutional. With justification that meets constitutional standards, the restriction on liberty does not violate the Constitution.

The Court mentioned 2 justifications for the Massachusetts law. First, it found that the state may be justified in restricting individual liberty "under the pressure of great dangers" to "the safety of the general public." The statute, by its terms, encroached on liberty only when "necessary for the public health or safety."[2(p29)] The smallpox epidemic proved the danger to the public. Second, by using the language of earlier decisions, the Court said that laws should not be arbitrary or oppressive. It also suggested that the state should use means that have a "real or substantial relation" to their goal.[2(p31)] In this case, vaccination was a reasonable means to achieve the goal of controlling the epidemic. It was not an arbitrary choice; it had a real and substantial relation to preventing the spread of smallpox.

These standards reflect the classic principle *sic utere tuo ut alienum non laeda*—so use your own that you do not injure another man's property—that the Court had applied in earlier cases.[23,26] One might have expected that these standards would be used to judge the validity of laws that restrict personal liberty. In later cases, however, the Court did not necessarily require states to meet these standards. Instead, it sometimes ignored the standards in favor of a more general principle that permitted more discretionary use of state power. For example, in 1922, in *Zucht v King*, the only other US Supreme Court decision that addressed immunizations, the Court upheld a city ordinance that prohibited anyone from attending a public or private school without a certificate of smallpox

vaccination.[47] Rosalyn Zucht, who refused vaccination, challenged the ordinance as unnecessary after she was excluded from school. The Court did not mention the questions of whether smallpox posed any danger, whether vaccination was necessary, or whether the ordinance was arbitrary or oppressive. Its 3-paragraph opinion noted simply that states can grant cities broad authority to decide when to impose health regulations.

In 1927, in *Buck v Bell*, the US Supreme Court upheld a Virginia law that authorized the involuntary sterilization of "feeble minded" persons in state institutions.[48] Theories of eugenics enjoyed some medical and scientific support during the 1920s and 1930s.[49] The Court found that the law served the public health and welfare because "mental defectives" would produce degenerate criminal offspring or imbeciles who "sap the strength of the state."[48(p207)] In a chilling opinion, Justice Oliver Wendell Holmes concluded:

> Society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. *Jacobson v Massachusetts*, 197 US 11. Three generations of imbeciles are enough.[48(p207)]

Jacobson was cited as support for the general principle that public welfare was sufficient to justify involuntary sterilization. The decision extended the police power's reach from imposing a monetary penalty for refusing vaccination to forcing surgery on a young woman against her will and depriving her of the ability to have children.[50] The Court did not require the state to demonstrate that sterilization was necessary and not arbitrary or oppressive. This suggests that the Court did not view *Jacobson* as having required any substantive standard of necessity or reasonableness that would prevent what today would be considered an indefensible assault. The Court did not even consider that Carrie Buck might have any right to personal liberty. With the Court's imprimatur of involuntary sterilization laws, more than 60 000 Americans, mostly poor women, were sterilized by 1978.[51]

Such cases diluted the reasons that justified restrictions on personal liberty. The Court did not always say that danger meant an immediate threat to the public at large, and it accepted a broader range of means as reasonable. The Court generally accepted, with little analysis, the legislature's judgment of what should be done to protect public health and safety, at least where only individual liberty was affected.[52–54] In contrast, when state laws regulated commercial businesses and economic relationships, the Court typically required a close fit between goals and means.[55] In *Lochner v New York*, which was decided 2 months after *Jacobson,* the Court struck down a New York state statute that limited the working hours of bakers to 60 hours per week, because it was "an unreasonable, unnecessary and arbitrary interference with the right and liberty of the individual to contract in relation to his labor."[56] The period between 1905 and 1937 is sometimes called the *Lochner* era, because the Court struck down many laws that regulated private economic relationships, such as labor laws, as a violation of property rights (also protected by the Due Process Clause) and freedom of contract.[43] These decisions reflected a prevalent belief that private property and a laissez-faire economic order were essential to preserve individual liberty and economic opportunity.[22,23,26,57]

By 1937, the Depression had shattered the belief that individuals could always take care of themselves, and the Roosevelt Administration pressed for reform legislation.[58] An increasing number of justices and scholars recognized that economic survival and personal freedom required some affirmative government action to provide services and to regulate private industry.[59] Thus, even seemingly private decisions could be viewed as affected by the public interest and subject to regulation.[60] The Court abandoned its *Lochner* jurisprudence and ultimately overruled or ignored decisions from that era.[61–63] The Court began to routinely uphold state and federal legislation, and it accepted any plausible means a legislature chose to pursue legitimate ends, unless the law violated the Constitution.[64–66]

The Court then faced the problem of deciding how constitutional provisions limited government action. The Bill of Rights describes individual rights in broad terms, such as freedom of speech and due process of law. In a democracy that has no official religion or ideology, any interpretation of such abstract concepts could be attacked as merely the justices' personal philosophy.[67] Yet, if they upheld all laws that are purported to serve the common good, such as involuntary sterilization, government power would be unlimited—the definition of tyranny.[68] There was agreement that the Constitution was intended to prevent tyranny by government and that the Bill of Rights (and later amendments) were added to forbid majority rule on matters of fundamental importance.[69] Thus, the Court began to recognize a carefully limited hierarchy of individual rights that deserved protection from government invasion.[70,71] The Court still struggles with the problem of finding legitimate bounds on government powers. Nevertheless, it has consistently relied on constitutional rights to limit state power.

MODERN CONSTITUTIONAL LAW: RECOGNITION OF HUMAN AND CIVIL RIGHTS

During the second half of the 20th century, the US Supreme Court recognized that the liberty protected by the 14th Amendment included most of the rights guaranteed by the Bill of Rights.[43] Individuals were protected from an abuse of state and federal power. World War II and the Nazi atrocities spurred recognition of human rights, as exemplified by the Nuremberg Code.[72] In the United States, the

civil rights movement of the 1950s challenged the assumption that state legislatures could be presumed to act in the best interests of all their citizens in a way that had not been seen since the Civil War. The civil rights movement changed the social structure with as much force as the New Deal changed the economic structure. *Brown v Board of Education*,[73] which struck down state-imposed school segregation, marked a turning point when it signaled the Court's new willingness to look closely at what state laws require or forbid and to strike down laws that invidiously discriminated against African Americans.[74] During the next 2 decades, women, people with mental illnesses, and prisoners followed the example of African Americans and challenged laws that treated them unfairly.

The Court created an explicit hierarchy of rights and tests for determining whether laws justifiably restricted different constitutionally protected rights, such as freedom from self-incrimination[75] and unreasonable search and seizure.[76] For constitutionally protected liberty, the Court recognized that some aspects of liberty, such as freedom from arbitrary detention and bodily intrusion, are more important than others, such as freedom to use property or money.[77–79] The most important, which were deemed "fundamental," were subjected to the "strict scrutiny" test: the Court determined (1) whether the government could prove that challenged law served a purpose so "compelling" that it was justified in taking action and (2) whether what the law required or forbade was "narrowly tailored" to achieve that purpose and did so with as little interference with individual liberty as possible.[14] Few rights qualify as fundamental. They include freedom of speech and association,[80,81] voting,[82] freedom from arbitrary physical restraint,[83] and decisions about marriage,[84,85] contraception,[86–88] procreation,[89] family relationships,[90,91] child rearing, and education.[92,93] For example, a Virginia law that made interracial marriage a felony was struck down in 1967 because "the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State."[84]

Aspects of liberty that do not qualify as fundamental are subjected to "rationality review," a test that continues the Court's earlier deference to the legislature. Laws that restrict nonfundamental liberty rights need only be "rationally related" to any "legitimate state interest," and the Court continues to accept almost any plausible reason as justification. Laws that regulate industry to reduce risks to health or safety are easily justified under this test. Some justices and scholars have criticized this 2-tiered view of rights, because it is not sensitive to the importance of some aspects of personal liberty that do not qualify as fundamental.[94,95] In some circumstances, the Court has demanded that the state provide a higher level of justification for limiting personal liberty, even when it does not explicitly call the right fundamental.[96,97] For example, in cases that involve civil commitment or involuntary hospitalization for mental illness, the Court has required the state to prove—by clear and convincing evidence—that a person is mentally ill *and* that the illness renders the person dangerous to others.[83,88,98–100] Similarly, the Court has generally recognized the rights of individuals to make decisions about medical treatment, including the right to refuse life-saving treatment.[101–104] Today, decisions to participate in research or to use experimental and investigational drugs or "therapies" also require the individual's informed consent, even in the military.[105] Most recently, the Court found that states cannot justify restricting personal liberty solely on moral grounds. In *Lawrence v Texas*, the Court struck down a Texas statute that made private anal sex between consenting same-sex adults a crime because the law served no legitimate state purpose.[91]

At the same time, the ways in which government achieves its goals has been changing. Modern biomedical and behavioral sciences, epidemiological research, and information technology offer tools for protecting health that were not available during the first half of the 20th century. Public health programs have drawn upon scientific advances to create more voluntary services for a more diverse population and new and different health problems.[106,107] Responsibility for public health has spread from local community officials to cooperation with private organizations, the federal government, and even international organizations. As similar health problems increasingly affect people all across the country, the federal government has assumed substantial regulatory authority, just as it did for civil rights protection during the 1960s and environmental protection during the 1970s.[108–112]

During the past decade, the US Supreme Court has recognized some limits to the federal government's constitutional authority to regulate interstate commerce when it intrudes on matters traditionally considered part of the police power.[113–116] But, despite rhetoric about the importance of state sovereignty, its decisions have not expanded state power.[43,117] The power of a sovereign state can hardly be increased. Instead, the Court has struck down federal remedies for individuals who suffer from abuses of state power.[118,119]

Even with this caveat, the federal government remains a major player in national public health matters. In addition to direct regulation under the Commerce Clause, it wields considerable influence over state and local public health activities with its power of the purse. In practice, therefore, the states' power is exercised in a somewhat more restricted sphere of human and commercial activity. Yet within this sphere, current constitutional law recognizes few limits on the states' police power, except in the rare circumstances when it unjustifiably restricts important personal liberties.

APPLYING MODERN CONSTITUTIONAL LAW

Given the changes in constitutional law, public health, and government regulation, what kinds of public health laws that address contagious diseases might be constitutionally permissible today? A law that authorizes mandatory vaccination during an epidemic of a lethal disease, with refusal punishable by a monetary penalty, like the one at issue in *Jacobson*, would undoubtedly be found constitutional under the low constitutional test of "rationality review." However, the vaccine would have to be approved by the FDA as safe and effective, and the law would have to require exceptions for those who have contraindications to the vaccine. A law that authorizes mandatory vaccination to prevent dangerous contagious diseases in the absence of an epidemic, such as the school immunization requirement summarily upheld in 1922, also would probably be upheld as long as (1) the disease still exists in the population where it can spread and cause serious injury to those infected, and (2) a safe and effective vaccine could prevent transmission to others.

The legitimacy of compulsory vaccination programs depends on both scientific factors and constitutional limits. Scientific factors include the prevalence, incidence, and severity of the contagious disease; the mode of transmission; the safety and effectiveness of any vaccine in preventing transmission; and the nature of any available treatment. Constitutional limits include protection against unjustified bodily intrusions, such as forcible vaccination of individuals at risk for adverse reactions, and physical restraints and unreasonable penalties for refusal.

Ordinarily, there would be no justification for compulsory vaccination against a disease like smallpox that does not exist in nature. The Centers for Disease Control and Prevention's recent attempt to persuade health care workers to voluntarily accept smallpox vaccination failed, largely because of concerns about the risks of vaccination in the absence of a credible threat of disease.[120] Protecting the country against a terrorist's introduction of smallpox would fall within federal jurisdiction over national security. The intentional introduction of smallpox also could be a crime under both federal and state law. Assuming that an FDA-approved vaccine were available, there would be little, if any, practical need for a mandatory vaccination law. People at risk would undoubtedly demand vaccine protection, just as they clamored for ciprofloxacin after the (noncontagious) anthrax attacks in 2001.[121] The real problem in such cases is likely to be providing enough vaccine in a timely manner. The same may be true for a natural pandemic caused by new strains of influenza, for example. On the other hand, if a vaccine were investigational, compulsory vaccination would not be constitutional, and people would be less likely to accept it voluntarily.[122,123]

Likewise, a state statute that actually forced people to be vaccinated over their refusal, such as Florida's new "public health emergency" law, would probably be an unconstitutional violation of the right to refuse treatment.[124] In the case of Nancy Cruzan, the Court assumed, without having to decide, that competent adults have a constitutionally protected right to refuse any medical treatment, including artificially delivered care such as nutrition and hydration.[102] Even the state's legitimate interest in protecting life cannot outweigh a competent adult's decision to refuse medical treatment.[104,125] Today, a general interest in the public's health or welfare could not justify sterilizing Carrie Buck against her will. Since *Griswold v Connecticut*, the Court has repeatedly struck down state laws that interfere with personal reproductive decisions. All competent adults have the right to refuse surgical sterilization. The Court also said that people who cannot make decisions for themselves because they are legally incompetent are entitled to have their wishes respected and carried out.[102] If their personal wishes are unknown, they must be treated in accordance with their own best interests, not the interests of the state.

Such cases underscore an important difference between laws that are intended to prevent a person from harming other people, which can be a justified exercise of police power, and laws that are intended to protect only the health of the individual herself, which are unjustified violations of liberty. A committee appointed by the British government is reportedly considering a proposal to vaccinate children with vaccines that block the highs produced by cocaine, heroin, and nicotine.[126,127] Which category might this proposal fit? Drug addiction is a public health problem[128] but not a contagious disease. It is unlikely that the possibility of a person becoming addicted to drugs in the future would be sufficient to warrant compulsory vaccination, even if it is assumed that the vaccine would not affect ordinary intellectual or emotional function. The modern public health approach would be to provide education about drug abuse or to offer safe and effective medications in a voluntary treatment program.

Even in an emergency, when there is a rapidly spreading contagious disease and an effective vaccine, the state is not permitted to forcibly vaccinate or medicate anyone. The constitutional alternative is to segregate infected and exposed people separately to prevent them from transmitting the disease to others. Here again, modern constitutional law demands a high level of justification. The Supreme Court has long recognized that "involuntary confinement of an individual for any reason, is a deprivation of liberty which the State cannot accomplish without due process of law,"[98] and some justices have called freedom from such confinement fundamental in nature.[83] While it has not decided a case that involved isolation or quarantine for disease, it has

held that civil commitment for mental illness is unconstitutional unless a judge determines the person is dangerous by reason of a mental illness.[83,98] Assuming, as most scholars do, that the law governing commitment to a mental institution also applies to involuntary confinement for contagious diseases, the government would have the burden of proving, by "clear and convincing evidence," that the individual actually has, or has been exposed to, a contagious disease *and* is likely to transmit the disease to others if not confined.[129,130]

When the HIV epidemic began in 1981, these principles from the 1970s reminded legislators at both the state and federal levels that people could not be involuntarily detained simply because they had HIV infection.[131] Only a few individuals who imminently threatened to infect other people by deliberate or uncontrollable behavior would meet the constitutional test. More recently, the same approach has been used by lower courts in some cases that involved people who had active, contagious tuberculosis.[132,133] Involuntary commitment has been used for a small number of people who were unable to avoid contact with others, typically because of mental illness, substance abuse, or homelessness.[134–137] In practice, people who can stay in their own homes and have access to adequate care are virtually never subjected to involuntary commitment. They do not need to be committed for effective public health protection. The need for coercive measures like compulsory isolation can be seen as evidence of a failure to provide the public health programs that could have prevented or treated disease.[138–140] For example, the rise of tuberculosis in New York City during the 1980s, and the city's increased use of involuntary isolation for people who had untreated tuberculosis, owes more to the collapse of the city's treatment programs than to the value of involuntary commitment.[141,142]

Today, involuntary isolation and quarantine should be needed and used only in extremely rare cases. The most likely is where a new airborne infectious disease, such as severe acute respiratory syndrome (SARS), for which no treatment yet exists, enters the country. Yet, even with the SARS epidemic, there proved to be almost no need to compel isolation, and quarantine was almost exclusively done in the individual's home.[143,144] After all, laws that compel detention necessarily apply to the exceptional person, just as Henning Jacobson was in 1905. Most people were eager to take precautionary measures voluntarily. In Beijing, China, however, where the government was rumored to be planning a large-scale quarantine, almost 250 000 people fled, which increased the risk of spreading the disease. Indeed, historically, large-scale quarantines have had little positive effect on epidemics.[145]

As a practical matter, major new epidemics or terrorist attacks are likely to be considered national emergencies. In such circumstances, overreactions are likely and constitutional rights may be trampled, regardless of established law, which is what happened when the military forced Americans of Japanese descent into internment camps during World War II. In 1944, Fred Korematsu's detention in such a camp was upheld by the US Supreme Court in a decision that has been regretted ever since.[146] In an amicus curiae brief in the cases against the Bush Administration by individuals detained without charges at Guantánamo Bay in connection with the "war on terror," Korematsu reminded the Supreme Court:

> History teaches that, in time of war, we have often sacrificed fundamental freedoms *unnecessarily.* The Executive and Legislative Branches, reflecting public opinion formed in the heat of the moment, frequently have overestimated the need to restrict civil liberties and failed to consider alternative ways to protect the national security.[147]

In 2004, however, the Court was no longer willing to give government "a blank check."[148] It found that even individuals who were being held as presumed terrorists were entitled to constitutional due process protections.[148,149]

LESSONS FOR MODERN PUBLIC HEALTH

One hundred years after *Jacobson*, neither public health nor constitutional law is the same. Programs essential to today's public health, such as those that regulate hazardous industries and products and that provide medical care, which would have been struck down in 1905, are routinely upheld today because they serve a legitimate public purpose and do not interfere with personal liberty. In contrast, deprivations of liberty that might have been upheld in 1905 would be struck down today. Public health now has better tools at its disposal: better science, engineering, drugs and vaccines, information, and communication mechanisms for educating the public.

The history of US Supreme Court decisions about states' power to restrict personal liberty shows the different ways in which states' power can be characterized. At bottom, however, all doctrinal interpretations begin with 1 of 2 presumptions: (1) the state has complete power to do anything that is not expressly prohibited by the federal or its own state constitution, or (2) the state has only those powers granted to it by the people or that constitute an essential aspect of sovereignty for which governments are formed.[150,151] Although traces of both views can be seen in the opinions of different justices, the Court has generally adopted the first view: the Constitution provides the only limit on state power. Thus, the Court's interpretation of what counts as a constitutional right assumes extraordinary importance. As Justice Charles Evans Hughes noted, "We are under a Constitution, but the Constitution is what judges say it is. . . ."[152(p199)]

During the past decade, the Court has been reluctant to recognize constitutional protection for new aspects of liberty. Some

scholars and conservative justices have argued that the Due Process Clause does not or should not protect personal liberty, such as the freedom to use contraception, and that states should have freer reign to impose restrictions on people.[153–156] Others argued that, without such protection, we might as well not have a Constitution.[157] Although the Court is not likely to soon abandon what it has already recognized, the renewed debate makes clear how fragile constitutional rights might be.

At a time when terrorism threatens the entire world, people may be easily convinced that their security depends upon giving up their liberty. People also may believe laws that restrict personal freedom will not apply to them. History supports the view that coercive laws have largely targeted disadvantaged minorities. Quarantine laws were most often directed at disfavored immigrant groups.[39,138] During the 19th and early-20th century, people who were poor, nonwhite, or recent immigrants were widely believed to live in filth, intoxication, violence, and debauchery or were often blamed for harboring and spreading disease.[158,159] Such attitudes may have surfaced when the Boston Board of Health sent police officers to inoculate "tramps" against smallpox. Police reportedly held some men down and beat others to accomplish their task.[160] Although we may believe we are more enlightened today, similarly disfavored groups are targets of antiterrorism laws.[161]

In an era of increasingly limited state funds, there is a danger that legislatures will turn to laws that restrict personal liberty as a substitute for providing the resources necessary for positive public health programs that actually prevent disease and improve health. Such symbolic "grandstanding" may be especially tempting for representatives whose reelection depends more on those who finance their campaigns than on the voters.[162] But it shifts responsibility for protecting the public health from the government to individuals and punishes those who are least able to protect themselves. The Bill of Rights was designed to protect individuals against abuses by the state, even when the abuses have the support of the majority. This is why constitutional protection of liberty remains so important.

One practical reason for protecting constitutional rights is that it encourages social solidarity. People are more likely to trust officials who protect their personal liberty. Without trust, public officials will not be able to persuade the public to take even the most reasonable precautions during an emergency, which will make a bad situation even worse. The public will support reasonable public health interventions if they trust public health officials to make sensible recommendations that are based on science and where the public is treated as part of the solution instead of the problem. Public health programs that are based on force are a relic of the 19th century; 21st-century public health depends on good science, good communication, and trust in public health officials to tell the truth. In each of these spheres, constitutional rights are the ally rather than the enemy of public health. Preserving the public's health in the 21st century requires preserving respect for personal liberty. ■

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